Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Techno-Sciences, Inc.

File: B-277260.3

Date: May 13, 1998

Minh N. Vu, Esq., Latham & Watkins, for the protester.
Mark Langstein, Esq., and Amy L. Freeman, Esq., Department of Commerce, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Two task orders are within the scope of an existing contract for the operation, maintenance, and technical support of the United States Mission Control Center (USMCC) online and offline system, where that contract specifically contemplated that operations, maintenance, and technical support would include whatever was necessary to support the USMCC mission, except maintenance of the proprietary software, and the task orders at issue cover software development to work around problems in the protester's proprietary software currently operating the online functions; analysis of the functional requirements of the online system; design of new software for the USMCC, including the online functions; and installing and testing the new software.

DECISION

Techno-Sciences, Inc. protests two task orders issued under contract No. 50-DDNE-5-00039, between the National Oceanic and Atmospheric Administration (NOAA) and Science Systems and Applications, Inc. (SSAI) for operation and maintenance of the United States Mission Control Center (USMCC). Techno-Sciences contends that the task orders exceeded the scope of SSAI's contract and should have been procured competitively.

We deny the protest.

In 1979, several countries, including the United States, developed the Space System for Search of Vessels in Distress/Search and Rescue Satellite Aided Tracking Cospas-Sarsat Program, which utilizes satellites to detect and locate radio beacons emitted by ships, aircraft, or individuals. The United States and certain other countries operate mission control centers (MCC) that are responsible for processing and distributing search and rescue information to the appropriate rescue entity.

The current USMCC is comprised of online functions, offline functions, and monitoring and analysis functions. The online functions include communications; alert data processing; Cospas-Sarsat system data processing; local user terminal (LUT) monitoring and control; data archive and daily event logging; geographical display; performance and monitoring data collection; data recovery; and self-test, status, security, and alarm. The offline functions of the current USMCC include maintaining the 406 megahertz registration data base; orbit vector processing; LUT pass scheduling; location protocol beacon bypass; and search and rescue data analysis mapping and display. The automated portion of the monitoring and analysis functions include the self-test and monitoring system, the incident history data base, the LUT monitoring data base, and the operator-based logs and display software.

SSAI has been the operations, maintenance, and technical support contractor for the USMCC since 1986, and has assisted the agency in the major software development effort associated with transferring the USMCC from Scott Air Force Base to NOAA's facility in Suitland, Maryland. The effort required the development of new applications software and data base enhancements to run both the online and offline portions of the USMCC that was completed in 1990.

In 1991, NOAA contracted with Techno-Sciences to develop new online software to operate on a personal computer (PC) system rather than on the mainframe computer previously utilized for these functions. Techno-Sciences developed proprietary software for the operation of all USMCC online functions based upon functional requirements defined by SSAI and itself. The conversion to a PC-based system using Techno-Sciences's proprietary software was completed on October 27, 1993. Techno-Sciences had been responsible for maintaining its proprietary software under a sole-source contract let in May 1994 for a base year with 4 option years. The option years contained a guaranteed minimum price of $200,000 for each option year. After unsuccessfully attempting to purchase the proprietary software from Techno-Sciences or to renegotiate what it considered to be unreasonably priced options, NOAA did not exercise the option for Techno-Sciences's contract for the period May 10, 1996 to May 9, 1997. The agency attempted to obtain maintenance of the online software by issuing Techno-Sciences a purchase order to perform the services on-call but Techno-Sciences declined.[1]

SSAI has been responsible for maintaining the offline and other USMCC software, and operating the USMCC on a continuous, 24-hour basis. The current contract with SSAI for operation and maintenance of the USMCC was competitively awarded

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[1]The protester asserts that it rejected this offer because it believed that the government was attempting to circumvent the terms of its canceled contract, but that it offered to perform emergency maintenance of its software at no cost to the government.

on June 15, 1995. It is a combined fixed-price and cost-plus-fixed-fee, level-of-effort contract for a base period with 4 option years at an estimated award price of $6,217,429. The cost-reimbursement portion of the contract was awarded at an estimated cost of $795,657 for the base period and $811,933, $831,378, $852,548, and $876,385, respectively, for the option years.

Section C.2 of the contract statement of work (SOW), entitled Scope of Work, states:

> This SOW defines the required support for operation including data entry, software maintenance, and technical support of the [USMCC]. Although the contractor shall not be responsible for the maintenance of any proprietary software used in the USMCC, the contractor shall be responsible for its usage, operation, the knowledge of its functions, and monitoring its performance.
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> The contractor shall provide trained computer operators to operate the USMCC on an around-the-clock basis and data entry operators to perform data entry for USMCC data bases. Operations and data entry shall be performed onsite at . . . Suitland, MD. Software maintenance shall consist of corrective, adaptive, and perfective maintenance of applications and non-proprietary software of the USMCC as identified in Section C.3.B of this SOW.[2] Corrective software maintenance shall be required on a . . . (24) hour/day basis. Technical Support shall consist of support to the Government in the areas of analysis of new or changing COSPAS-SARSAT requirements, monitoring the performance of the U.S. ground segment including the USMCC, LUTs, data communications links and hardware, operational maintenance of data communications hardware at the US LUTs, US RCCs [Rescue Coordination Centers] and USMCC, briefings, tours, technical participation in national and international COSPAS-SARSAT meetings, and other support as required by the Government in support of the COSPAS-SARSAT mission.

Section C.4.C of SOW states:

> Work defined in this Section C.4.C shall be performed on a cost reimbursable basis. The contractor shall provide technical and

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[2]Section C.4.B of the SOW requires corrective maintenance (defined as the contractor's response to remedy a software problem), adaptive maintenance (defined as the changing of software to accommodate a change in requirements or the data environment), and perfective maintenance (defined as the change of software to better meet operational requirements).

> analysis support to the government in support of the USMCC mission and COSPAS-SARSAT. As part of this support, the contractor shall:
>
> -attend and participate in COSPAS/SARSAT related national and international meetings as requested by the Government
>
> -provide briefings and tours for visitors as required
>
> -provide technical support for the analysis of false alarms and interferers, the definition of service areas, the addition of new [Search and Rescue Point of Contacts], the evaluation of new COSPAS-SARSAT related technology, and the commissioning of new MCCs
>
> -define the communications paths and techniques as locations are added or deleted to the locations to which the USMCC communicates
>
> -troubleshoot data communications problems
>
> -maintain all data communications operational parameters including USMCC and LUT switch settings and script for accessing network services and status
>
> -monitor and maintain communications and terminal equipment including printers at the RCCs and X.25 switches at the LUTs and USMCC
>
> -provide the necessary maintenance and administrative services for the [local area network].

After not exercising the option under Techno-Sciences's contract, NOAA began efforts to replace Techno-Sciences's proprietary software. In furtherance of this objective, NOAA issued task order No. 2 on June 28, 1996 under the cost-reimbursement portion of the SSAI contract. Section 2.0 of this task order states:

> In the absence of a maintenance contractor for the online software, [SSAI] shall provide appropriate personnel to analyze problems detected in the online software and take appropriate action to minimize or eliminate the problems including the development of software to work around the online functions causing the problems.

In section 4.0, entitled Technical Support, of this task order, various significant changes in the USMCC, including the need to replace the proprietary online software with a nonproprietary software, are set forth and it is stated:

> The resultant requirements revisions have become difficult to manage because of confusion between hard requirements and those with sufficient support. Therefore [SSAI] shall collect and analyze the total set of requirements for the USMCC functions and develop a new USMCC Functional Requirements Document. The Contractor shall also provide appropriate Requirements Reviews to allow the Government to approve the newest set of USMCC requirements. . . . Based on the approved set of requirements, [SSAI] shall develop a Preliminary Design for an upgraded USMCC.

Task order No. 3, issued on June 26, 1997, added further work to the SSAI contract. This order, among other things, required the following technical support:

> Provide Systems Analysis and Design Analysis Support for the Development of the FG [fourth generation] USMCC. The USMCC Support Services Contractor shall continue the design analysis for the FG USMCC. This will include the development of Program Design Specifications for the subsystems identified in the FG USMCC preliminary design; the development of test plans and test data sets for FG USMCC testing and assistance to the FG USMCC development contractor for design related issues.

On March 14, 1997, NOAA awarded a section 8(a) contract to Research and Professional Services, Inc. (RPS) to code, test, and maintain nonproprietary software to operate the online functions of the USMCC at an estimated cost of $829,256. Techno-Sciences protested that RPS's award price exceeded the fair market price for the software in violation of Federal Acquisition Regulation § 19.806(b). We sustained the protest because, in determining whether the RPS contract amount exceeded a fair market price, the agency had not considered Techno-Sciences's offer to supply nonproprietary software to meet the agency's requirements at a far lower price. We recommended that the agency review its fair market price estimate specifically considering Techno-Sciences's MCC software. Techno-Sciences, Inc., B-277260, Sept. 22, 1997, 97-2 CPD ¶ 115 at 8.

NOAA undertook a market survey on November 6, 1997. Techno-Sciences protested the propriety of the survey. We sustained this protest because Techno-Sciences was being requested to submit a price for items that were not included in the RPS contract such that the results of the survey would not fairly show whether the contract exceeds a fair market price. We again recommended that the agency review its fair market price estimate, considering Techno-Sciences's MCC software,

so as to determine whether the RPS contract exceeds a fair market price. Techno-Sciences, Inc., B-277260.2, Mar. 25, 1998, 98-1 CPD ¶ ___.[3]

During the course of Techno-Sciences's protest involving the market survey, it discovered that NOAA had issued task orders to SSAI's operations and maintenance contract to require that contractor to perform various work that affected the online software portion of the USMCC. In this regard, the record developed during the course of that protest established that SSAI has developed certain software to work around Techno-Sciences's proprietary software, has analyzed the online requirements and documented them in a functional requirements document, and has developed detailed design specifications for online software to replace Techno-Sciences's proprietary software.

Techno-Sciences protests that task order Nos. 2 and 3 are outside the scope of SSAI's contract. Those task orders require SSAI to perform work-arounds to Techno-Sciences's proprietary online software; to analyze and develop a functional requirements document to include the online functions; to design the software for the FG USMCC, including the online functions; and to test and install the FG USMCC software. In support of its contention that the work is beyond the scope of SSAI's contract, the protester points to the language in the SOW that expressly provides that SSAI is not responsible for maintaining any proprietary software, the fact that no express language covering the work is contained in the contract, the fact that when SSAI's contract was let Techno-Sciences was responsible for maintaining the proprietary online software, and the fact that costs under the contract have exceeded the estimated price of the work.

NOAA responds that the work being performed by SSAI under these task orders is within the scope of SSAI's contract because of the broad language of the technical support section of the SOW, which was said to cover support of the entire COSPAS-SARSAT mission as well as the USMCC effort--both online and offline functions--with the sole exception of maintaining Techno-Sciences's proprietary software. NOAA further notes that the scope of work contemplated that SSAI would have responsibility for the online system, with the one exception of maintenance of the proprietary software, and asserts that developing software to work around Techno-Sciences's software is not maintenance and that designing replacement online software is a technical service contemplated under the SOW. Finally, NOAA maintains that the costs in connection with these tasks have only slightly increased the costs of SSAI's contract. We agree with NOAA that the work in question is within the scope of SSAI's contract.

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[3]NOAA has requested reconsideration of this decision, and that request is currently pending.

Once a contract is awarded, our Office generally will not review modifications or task orders issued under that contract, because such matters are related to contract administration and are beyond the scope of our bid protest function. 4 C.F.R. § 21.5(a) (1998); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to this rule is where it is alleged that a modification (or task order, as in this case) is beyond the scope of the original contract, since the work covered by the modification or task order would otherwise be subject to the statutory requirement for competition (absent a valid determination that the work is appropriate for procurement on a sole-source basis). 41 U.S.C. § 253(a)(1)(A) (1994); MCI Telecomms. Corp., supra; Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6; Indian and Native Am. Employment and Training Coalition, B-216421, Apr. 16, 1985, 85-1 CPD ¶ 432 at 2.

In determining whether a modification or task order is beyond the scope of the contract originally ordered such that competition is required, our Office looks to whether there is a material difference between the modification or task order and that contract. MCI Telecomms. Corp., supra; see AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of modification or task order issued. Indian and Native Am. Employment and Training Coalition, supra; Data Transformation Corp., supra. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Neil R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212 at 3, cited in AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d at 1207.

The record shows that the express purpose of the SSAI contract is to provide NOAA with the required support necessary to operate and maintain the USMCC. Consistent with this purpose, the language in the scope of work broadly defines technical support to include, among other things, analysis of new or changing Cospas-Sarsat requirements, and other support as required by the Cospas-Sarsat mission. Further, section C.4.C of the SOW specifically requires SSAI to provide technical and analysis support to the government in support of the USMCC mission and Cospas-Sarsat, without any stated restrictions. Also, the SOW makes clear that the only aspect of operations, maintenance, and technical support of the USMCC for which SSAI is not responsible is the actual maintenance of Techno-Sciences's online proprietary software; indeed, without access to the source code to the online software, SSAI could not practicably maintain that software. We agree with NOAA that the development of the work-arounds to the software to allow the USMCC system to work does not constitute maintenance of the proprietary software as defined in the SOW. Inasmuch as the work ordered in task order Nos. 2 and 3 constitutes technical analysis and support necessary for the USMCC/Cospas-Sarsat

missions, we think that the work is not materially different in character or nature from the work specified in the SSAI contract.

Techno-Sciences's argument (that the work is outside the scope since the contract did not expressly mention technical analysis of, developing work-arounds to, and designing a replacement online system for the proprietary software) ignores the fact that the language in the contract intentionally does not limit SSAI's technical support responsibilities regarding the USMCC. For example, under C.4.C, the specific examples listed are identified as only "part" of the technical analysis in support of the USMCC mission and Cospas-Sarsat. Given the agency's problems with Techno-Sciences's USMCC software (including its proprietary nature) and the absence of a contract with Techno-Sciences to address these concerns, as well the necessity for other system upgrades to the USMCC, we think that the development of work-arounds to that software to allow the USMCC to operate and the design of new software for the USMCC, including for the online functions, fit within the broadly worded technical support section of the SSAI contract SOW, even though the need for these specific tasks was not known at the time of contract award.[4] In this regard, since the USMCC is a dynamic system, undergoing annual and other changes on a constant basis, it could not be expected that every specific technical support activity that was necessary to support the USMCC mission would be listed. See Lockheed Martin Fairchild Sys., B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 at 5. Thus, offerors should have reasonably anticipated that technical analysis and support might include services such as those ordered here. See Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CPD ¶ 158 at 4.

Techno-Sciences argues that the increased price of the work by as much as $585,484 in relation to the original award price shows that work is outside the scope of the original contract. The agency responds that this increase in contract value included other tasks unrelated to the protested work and the amount attributable to the cost of the online work is much less. In any case, we do not think that a $582,484 increase in contract value on a $6,217,429 contract is sufficient to establish that the modification is beyond the scope of a contract, where, as here, the modification has not changed the nature or purpose of the contract. See Defense Sys. Group et al., B-240295 et al., Nov. 6, 1990, 1990 U.S. Comp. Gen. LEXIS 1182, at *11-13.

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[4]SSAI had performed similar duties under the predecessor operations, maintenance, and technical support contract.

In sum, we find that task order Nos. 2 and 3 did not contain work that was materially different from the work contemplated under the SSAI contract when it was awarded, and they are therefore not outside the scope of that contract.

The protest is denied.

Comptroller General
of the United States